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No. 83-419

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD BOULIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a licensed firearms dealer who sells "privately owned" guns away from his licensed premises is excused from the recordkeeping and reporting requirements of the Gun Control Act of 1968.

2. Whether a search warrant authorizing seizure of "firearms, ammunition and records involved in, used in or intended to be used in violation of" 18 U.S.C. 922(c) and (m) was overly broad.

3. Whether petitioner was properly convicted for conduct that was allegedly represented as lawful by officials of the Bureau of Alcohol, Tobacco, and Firearms.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not reported. The memoranda and orders of the district court (Pet. App. 13a-17a, 23a-26a, 27a-35a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1983. A petition for rehearing was denied on July 15, 1983 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on September 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial on stipulated facts (Pet. App. 36a-41a) in the United States District Court for the District of Maryland, petitioner was convicted on 10 counts charging failure of a federally licensed firearms dealer to maintain records

relating to five firearms transactions, in violation of 18 U.S.C. 922(c) and (m) (Pet. App. 22a-26a). Petitioner was sentenced to concurrent terms of one year's imprisonment, of which all but one month was suspended in favor of probation, and was fined $500. Petitioner subsequently filed a petition for a writ of error coram nobis, seeking vacation of his conviction. The district court denied the petition (*id.* at 13a-17a). Petitioner appealed from both his conviction and the denial of the coram nobis petition. The court of appeals affirmed (*id.* at 1a-10a), with one judge dissenting.

1. Petitioner, a former Maryland police officer, was a firearms dealer federally licensed to conduct his commerical business at a specific address in Silver Spring, Maryland (Pet. App. 23a, 36a-37a). As a licensed firearms dealer, petitioner was required to maintain a firearms record book (27 C.F.R. 178.125). Petitioner also maintained a separate log for weapons designated as his personal collection.

In September, October, and November 1977 petitioner set up tables at three gun shows in Maryland. On each occasion he sold firearms to Gordon Schoen, an unlicensed individual acting as an undercover agent for the Bureau of Alcohol, Tobacco, and Firearms (ATF).

On September 25, 1977, petitioner sold three semi-automatic firearms to Schoen without recording the sales on state or federal firearms transfer forms (Pet. App. 37a-38a). Petitioner recorded two of these sales in his personal weapons log but failed to record the sale of the third weapon (*id.* at 2a). None of these weapons was recorded in his dealer's firearm record book (*id.* at 37a).

Several days later, on October 1, 1977, petitioner sold a .357 magnum revolver to Schoen. The gun was not included in petitioner's records, and petitioner did not complete any of the required forms for its transfer (Pet. App. 2a, 37a-

38a).[1] Later that month, in a consensually recorded conversation, petitioner and Schoen discussed the sale of other firearms, including a Colt Python revolver. Petitioner agreed that future sales would be "off paper," that is, not recorded (*id.* at 72a), and on November 5 petitioner sold Schoen a Colt Python .357 magnum revolver at a gun show (*id.* at 38a). The handgun was not entered in petitioner's books, and he did not complete any federal or state transfer forms (*id.* at 2a, 38a).

On December 6, 1977, in another consensually recorded telephone conversation (Pet. App. 74a-82a), petitioner and Schoen discussed the sale of other guns. Petitioner agreed that the sales would be "like we did them before" (*id.* at 75a), that is, unrecorded. Before these sales were consummated, however, federal agents arrested petitioner and, a week later, executed a search warrant on his residence. Pursuant to the warrant, ATF agents seized 34 long guns, 49 handguns, 5,765 rounds of ammunition, and various records. Included among the seized weapons were the firearms mentioned in petitioner's December 6 telephone conversation (C.A. Br. 7).

2. After his arrest, petitioner filed a motion for the return and the suppression of the evidence seized during the execution of the search warrant. Fed. R. Crim. P. 41(e) and 12. At a hearing on his motion, petitioner testified that an unidentified ATF agent had assured him that he was not required to record private gun transactions relating to weapons he acquired away from his business premises without the use of his firearms license (Pet. App. 69a). The district court denied the motions (*id.* at 35a).

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[1]Petitioner also sold Schoen two other handguns on October 1. Because the proper transfer forms were filled out for these handguns, the government dismissed the three counts of the indictment relating to these sales (Pet. 2 n.1; Pet. App. 36a-41a).

Following his conviction, in a petition for a writ of error coram nobis, petitioner renewed the defense that he had been erroneously advised by the ATF that his "private" sales were legal. Petitioner cited a July 30, 1979, letter by John Krogman, then acting Director of the ATF, which stated that a licensee's disposition of personal firearms need not be recorded in the licensee's business records (Pet. App. 56a-61a). The district court, noting that petitioner had properly recorded some "personal" sales, rejected petitioner's assertion that he had relied on erroneous ATF advice (*id.* at 15a), and similarly dismissed the Krogman letter, observing that the present Director of ATF had disavowed the conclusion set forth in the letter (*ibid.*).

3. On appeal from petitioner's conviction and the denial of his coram nobis petition, the court of appeals affirmed (Pet. App. 1a-10a). The court first found that, under federal law, all of petitioner's firearms transactions were subject to the recording requirements of the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, irrespective of whether the firearms came from petitioner's personal or business collection (Pet. App. 5a-6a). The court also found that, by selling weapons at a location other than his licensed business address without complying with the reporting requirements of the Act, petitioner violated 18 U.S.C. 922(c) (Pet. App. 6a). The court then affirmed the district court's denial of the petition for a writ of error coram nobis, agreeing with the district court that petitioner did not in fact rely on erroneous ATF advice (*id.* at 6a). Turning to petitioner's challenge to the search warrant and seizure of his cache of personal weapons, the court rejected his claims that the warrant was unsupported by probable cause and that it did not describe with sufficient particularity the items to be seized (*id.* at 7a-8a).

ARGUMENT

It is undisputed that petitioner sold five guns to Schoen without submitting the appropriate forms to ATF or maintaining the proper records relating to the transfers. Petitioner, contends, however, that he was erroneously indicted under Sections 922(c) and (m) of the Gun Control Act of 1968, that the search warrant in this case was invalid, and that the government should have been held estopped from bringing this prosecution because of his alleged reliance upon the advice of an unidentified ATF agent. None of these contentions merits review by this Court.

1(a). Petitioner initially contends (Pet. 11-16) that he was improperly indicted under 18 U.S.C. 922(c). That Section, set forth at Pet. vii-viii, "allows a licensed gun dealer to sell a weapon to a person who does not appear at his business premises if various reports are made" (Pet. App. 6a). Petitioner, a licensed gun dealer, sold five weapons to Schoen, who did not appear in person at petitioner's licensed place of business, without making the reports required by Section 922(c). Hence, petitioner's conduct came within the plain language of the statute and "[h]e therefore properly was indicted under this section" (Pet. App. 6a).

When Congress enacted the 1968 gun control legislation, "it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974). Congress concluded that "the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States" (*ibid.*). (Citing S. Rep. 1097, 90th Cong., 2d Sess. 108 (1968)). The 1968 gun control legislation is clearly "aimed at restricting public access to firearms." *Huddleston*, 415 U.S. at 824.

As this Court has previously recognized, the "principal agent of federal [gun control] enforcement is the dealer." *Huddleston*, 415 U.S. at 824. He is required to keep records of the sale and disposition of firearms (*ibid.*). All commerce in ammunition and firearms is channeled through federally licensed dealers, "the focus of the federal scheme," in order "to eliminate the mail order and the generally widespread commerce in [firearms], and to insure that, in the course of sales or other dispositons by these dealers, weapons [will] not be obtained by individuals whose possession of them would be contrary to the public interest" (*id.* at 825; *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 5). To permit a licensed dealer to avoid the reporting requirements of the statute would defeat its underlying purpose.

Petitioner's contrary claim is predicated upon 27 C.F.R. 178.50, which requires a licensed dealer to obtain "a separate license * * * for each location at which a firearms or ammunition business * * * is conducted." On the basis of that regulation, petitioner argues that he was licensed to sell firearms only at his place of business, and that when he sold the firearms at the gun fair he was not a "licensed dealer" under Section 922(c). This contention, the rationale of which would essentially repeal the reporting requirement of Section 922(c), ignores the reality of petitioner's course of dealing in this case. Petitioner was a licensed dealer at all times relevant to this case; that he may have acted wrongfully as a licensee in transferring firearms away from his place of business does not alter his legal position, but merely shows that he failed to comply with the federal regulation that he not transfer possession of firearms in non-over-the

counter sales without satisfying the reporting requirements of 18 U.S.C. 922(c).[2]

In any event, in a pending rulemaking proceeding, ATF has proposed altering its regulations to permit a licensed dealer to sell firearms at a gun show within the same state as the dealer's licensed premises. Notice of Proposed Rulemaking No. 487, 48 Fed. Reg. 44088 (1983). This rulemaking proceeding will put to rest petitioner's claim that a dealer selling weapons at a gun show is "unlicensed," thereby depriving the issue raised by petitioner of any future practical importance.[3]

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[2]"[Y]our 1977 guide to Firearms Regulation," excerpted in part by petitioner (Pet. xiii-xiv), explains that a licensed dealer may sell firearms and ammunition at a gun show so long as he merely takes orders at that location and fills them at his licensed premises or through the mail (Pet. xiii).

[3]Although *United States* v. *Ruisi*, 460 F.2d 153 (2d Cir.), cert. denied, 409 U.S. 914 (1972), cited by petitioner (Pet. 12-14), appears to conflict with this analysis, any possible conflict does not merit the attention of this Court. In that case, as in the instant one, licensed dealers sold firearms at a gun show. Rather than being charged under 18 U.S.C. 922(c), however, they were charged with engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a). The defendants did not challenge their conviction under Section 922(a) on the ground that they were licensed, and the court of appeals assumed the propriety of the charge under those facts. Therefore, any conflict between *Ruisi* and this case is at most over which of two subsections of Section 922 was violated by petitioner's course of conduct; there is no conflict over whether the conduct is illegal — both *Ruisi* and the instant case would hold that petitioner had violated the Gun Control Act of 1968. See Fed. R. Crim. P. 7(c)(3) (error in citation of statute not ground for reversal of conviction unless prejudicial). Nor does the possible conflict between *Ruisi* and this case appear to be recurring. We are not aware of any subsequent reported decision which holds that a licensed dealer is unlicensed when he makes sales off his licensed premises. Finally, as noted above, the future significance of any discrepancy between *Ruisi* and this case is slight, due to the pending ATF rulemaking that will clarify that dealers making sales at gun shows are "licensed" under the Gun Control Act of 1968. 48 Fed. Reg. 44088 (1983).

b. Petitioner next contends (Pet. 16-20) that the record-keeping requirements of 18 U.S.C. 922(m) do not apply to personally owned firearms transferred by a licensed dealer. Petitioner accordingly argues that, because the five charged weapons in this case were allegedly owned in his "private capacity" (Pet. 17), he was not required to record their sales or to make the proper forms available for inspection by ATF. This argument is without legal or factual merit.

Petitioner's attempt to circumvent the statutory reporting requirements for licensed dealers by separating "business" from "personal" transactions is contrary both to case law and to the clear intent of Congress. *United States* v. *Scherer*, 523 F.2d 371 (7th Cir. 1975), cert. denied, 424 U.S. 911 (1976); *United States* v. *Currier*, 621 F.2d 7 (1st Cir. 1980). As the district court found (Pet. App. 31a-32a):

> [P]ersons who sell guns with sufficient frequency to be characterized as dealers do not have the option which defendant assumes exists to operate with or without a license. The statute requires that they be licensed and adhere to the restrictions established for the operation of a dealership. Therefore, the application of the record-keeping provisions to sales of weapons from a personal collection does not in any way discourage persons from becoming licensed dealers.
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> * * * * *
>
> A review of the statute establishes that the legislature intended the record-keeping provisions to apply to sales of weapons from a dealer's personal collection. First, the regulations promulgated pursuant to Sections 922 and 923(g) refer to the sale of "any firearm." Also, to achieve the purpose of the Gun Control Act, the record-keeping provisions must be applied to sales from personal collections. In *Barrett* v. *United States*, 423 U.S. 212 (1976), the Court explained that the act

was designed to prevent firearms from coming into the hands of the unqualified. If licensed dealers could avoid maintaining records by simply designating guns as belonging to a personal collection rather than a business inventory or by selling the guns from their residences rather than their place of business, the effectiveness of recording gun sales to monitor who receives the firearms would be destroyed.

Moreover, on the facts of his case, there is no reason to reach petitioner's claim that the decision below and the decisions in *United States* v. *Scherer, supra,* and *United States* v. *Currier, supra,* deprive him of the right afforded non-licensed persons to trade in privately owned firearms. In this case, petitioner engaged in a series of "off record" sales and proposed to engage in numerous similar transactions in the future. Had he not been a licensed dealer, his course of conduct would have subjected him to prosecution for dealing in weapons without a license.[4] Accordingly, he was not deprived of any "right" to be free from criminal

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[4]See, *e.g., United States* v. *Perkins,* 633 F.2d 856, 860 (8th Cir. 1981) (three transactions involving eight guns); *United States* v. *Tarr,* 589 F.2d 55, 59 (1st Cir. 1978) (" 'dealing' connotes a regular course of conduct carried on over a period of time or, at least, on more than one or two unrelated occasions"); *United States* v. *Powell,* 513 F.2d 1249, 1250 (8th Cir.), cert. denied, 423 U.S. 853 (1975) (six guns); *United States* v. *Williams,* 502 F.2d 581, 582-583 (8th Cir. 1974) (five transactions); *United States* v. *Kowalski,* 502 F.2d 203, 205 (7th Cir. 1974), cert. denied, 420 U.S. 979 (1975) (three sales). See also *United States* v. *Hernandez,* 662 F.2d 289, 291 (5th Cir. 1981); *United States* v. *Miller,* 644 F.2d 1241, 1245 (8th Cir.), cert. denied, 454 U.S. 850 (1981); *United States* v. *Masters,* 622 F.2d 83, 88 (4th Cir. 1980) (citing cases); *United States* v. *Angelini,* 607 F.2d 1305, 1307 (9th Cir. 1979); *United States* v. *Micieli,* 594 F.2d 102, 108 (5th Cir. 1979); *United States* v. *Swinton,* 521 F.2d 1255, 1258-1259 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1976); *Kaneshiro* v. *United States,* 445 F.2d 1266, 1269-1270 (9th Cir. 1971).

prosecution by the imposition of a recordkeeping requirement on his allegedly "personal" transactions.[5]

c. Petitioner also asserts (Pet. 13) that he cannot simultaneously be convicted of failure to comply with the reporting requirements for sale to an individual who does not appear at his licensed place of business, as set out in 18 U.S.C. 922(c), and failure to maintain the records required of licensed dealers, as specified by 18 U.S.C. 922(m).[6] Petitioner argues that the Section 922(c) counts charge him with failing to file Form 4473, Part II (Pet. App. 65a), which is to be completed for non-over-the-counter or mail-order sales, and that the Section 922(m) counts contrarily charge a failure to file Form 4473, Part I (Pet. App. 63a), which is to be completed for on-the-premises sales. This contention is incorrect.[7]

It is true that, had petitioner complied with Section 922(c), he would have directed the buyer to complete Form 4473 for each transaction and would have submitted Part II of the form — for non-over-the-counter sales — to the appropriate law enforcement office. However, the record maintenance and filing requirements of 18 U.S.C. 922(m)

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[5]Even if petitioner's licensed status deprived him of a right he would otherwise have to dispose of personally owned firearms without recording the disposition, there is no constitutional infirmity in the deprivation. See *United States* v. *Biswell*, 406 U.S. 311 (1972).

[6]18 U.S.C. 922(m) makes it unlawful for a licensed dealer "to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder." Section 923(g) requires a licensed dealer to "maintain such records of * * * sale, or other disposition, of firearms * * * as the Secretary may by regulations prescribe." The particular record that petitioner is charged with failing to maintain in the Section 922(m) counts is Form 4473, the official Report of Firearms Transaction form, required by 27 C.F.R. 178.124.

[7]It is also of no practical consequence in light of petitioner's concurrent sentences.

relate to Form 4473 as a whole, with no distinction between over-the-counter and non-over-the counter sales. In short, Section 922(c) and (m) are not mutually exclusive, as petitioner urges.[8]

2. Contrary to petitioner's claims (Pet. 20-21), the search warrant and affidavit in this case (Pet. App. 49a-55a) were not overly broad or vague. The warrant authorized seizure of "firearms, ammunition and records involved in, used in or intended to be used in violation of Title [18] U.S.C. Section 922(m) and 922(c)" (Pet. App. 49a). The courts below properly found the warrant to be within the " 'margin of flexibility' " permitted under the Fourth Amendment (Pet. App. 8a) (quoting *United States* v. *Lowry*, 675 F.2d 593, 595 (4th Cir. 1982)). See also Pet. App. 43a-45a.

The warrant and the accompanying affidavit made it clear that the focus of the search was petitioner's "personal" collection of firearms and ammunition stored in his residence, as well as the records relating to unreported transactions involving these weapons. Had the warrant not used

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[8]Petitioner's sole support for the contention that the Section 922(c) counts and Section 922(m) counts are mutually exclusive lies in a miscitation contained in the string cites at the bottom of each Section 922(m) count. Counts eight through twelve of the indictment (Pet. App. 45a-48a) charge petitioner with failing to keep records, in violation of 18 U.S.C. 923 and 27 C.F.R. 178.124(a). The string citation at the bottom of each count, however, cites 27 C.F.R. 178.124(c) in addition to 27 C.F.R. 178.124(a). Section 178.124(a) relates to Form 4473 as a whole, while Section 178.124(c) relates to the recordkeeping requirements for over-the-counter sales. Any ambiguity created by this oversight was never challenged directly by petitioner, nor is it material in this case. Petitioner was not misled by the miscitation, so any conceivable error was harmless. Fed. R. Crim. P. 7(c)(3). Moreover, in its memorandum explaining the basis upon which it convicted petitioner, the district court relied on 27 C.F.R. 178.124(a) and (f) (Pet. App. 24a-25a), and Section 178.124(f) relates to non-over-the-counter sales. Thus, the court's order made clear that it consistently regarded petitioner's conduct to be in violation of regulations directed at non-over-the-counter sales.

the shorthand reference to Sections 922(c) and (m), but spelled out instead that the search was to focus on evidence of suspected activity involving unrecorded "personal" firearms sales, petitioner's constitutional complaint would be palpably meritless.

The search warrant in *United States* v. *Cardwell*, 680 F.2d 75 (9th Cir. 1982), cited by petitioner (Pet. 20), authorized a search for and seizure of all records or other evidence of violation of the general tax evasion statute. In that case, and others cited therein, the executing officers were required " 'to make a legal distinction between fraudulent records and records that are not fraudulent, which they were not qualified to do.' " 680 F.2d at 78 (quoting *United States* v. *Abrams*, 615 F.2d 541, 542 n.2 (1st Cir. 1980)). Here, in contrast, it was not necessary that the executing agents carefully peruse petitioner's records to distinguish between evidentiary and non-evidentiary material. The records to be seized under the terms of the warrant were limited to evidence of the violation of two subsections of the firearms statute, and the warrant and accompanying affidavit focused the search on evidence relating to the sale of "personal" firearms without proper documentation. See *Andresen* v. *Maryland*, 427 U.S. 463 (1976). Thus, the warrant, when viewed in a "a commonsense and realistic fashion" (see *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)), was sufficiently particular to prevent "a general, exploratory rummaging in a person's belongings" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971)) and both inform the magistrate and instruct the executing officers on the particular items to be seized.[9]

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[9]A warrant need not describe the documents and evidence sought with surgical precision when the investigating agents have no way of knowing precisely what form those records might take. Because a more precise description was not feasible in these circumstances, the general description of "records involved in, used in and intended to be used in"

3. Finally, petitioner contends (Pet. 21-22) that he was convicted "for exercising a privilege which the State had clearly told him was available to him." *Raley* v. *Ohio*, 360 U.S. 423, 426 (1959). The courts below correctly rejected this claim (Pet. App. 6a, 14a-15a).

Petitioner asserts (Pet. 22 n. 16) that he relied upon the ATF "[Y]our 1977 guide to Firearms Regulation" (Pet. xiii-xiv) in undertaking the five sales at issue here. The guide, however, makes it clear that a licensee — such as petitioner[10] — must execute a Form 4473 each time he sells a firearm, and that at a gun show he can display and take orders but may not transfer firearms directly. In short, the 1977 guide, when read properly and as a whole, clarified that petitioner, as a licensed dealer, could not regularly and repeatedly engage in the sale of allegedly privately owned firearms at gun shows in circumvention of the statute.

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violations of the record-keeping provisions of the Gun Control Act of 1968 was acceptable. See *United States* v. *Christine*, 687 F.2d 749, 760 (3d Cir. 1982); *United States* v. *Smith*, 686 F.2d 234, 238 (5th Cir. 1982); *United States* v. *Cook*, 657 F. 2d 730, 733 (5th Cir. 1981); *United States* v. *Cortellesso*, 601 F.2d 28, 32 (1st Cir. 1979), cert. denied, 444 U.S. 1072 (1980).

[10]Petitioner maintains (Pet. 22 n.16) that at the gun shows he was a nonlicensee. Question and answer No. 59 in the 1977 firearms regulation guide (Pet. xiii) put petitioner on notice that he was still a licensee, despite the absence of a specific license to sell guns at the gun shows. The "Krogman" letter (Pet. App. 56a-61a), to which petitioner also refers, explains as well that a licensed firearm dealer may only accept orders at gun shows (*id.* at 58a). To the extent that the letter contains statements supportive of petitioner's position, we note that those statements have been disavowed by the Department of the Treasury (*id.* at 15a n.2) and the Krogman letter itself was written after petitioner's convictions and could not have been relied upon by petitioner when he committed the charged offenses.

Petitioner's related argument that he relied upon the opinion of an unidentified ATF agent was rejected by both the district court and the court of appeals (Pet. App. 6a, 14a-15a). Their conclusion that petitioner did not in fact rely upon the advice allegedly given him merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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